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Supreme Court of the United States

OCTOBER TERM, 1962

No. 623

WILLIAM RICKENBACKER,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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INDEX

	PAGE
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
CONSTITUTIONAL AND STATUTORY PROVISIONS	2
STATEMENT OF THE CASE	3
REASONS FOR THE WRIT	5
1. The use of coercion to require petitioner and 16,000,000 other people to answer the intimate questions about their home set forth in the Housing Questionnaire of 1960 violates the Fourth Amendment	5
2. The singling out of this petitioner for prosecution from the perhaps hundreds of thousands of people who refused to answer this questionnaire, because he had written a critical magazine article, violates the First Amendment	7
3. 13 USC § 221(a), penalizing one who refuses to answer questions about "himself" and his "family" does not apply to this petitioner who refused to answer questions about his house and the "extra persons" in the house	10
4. There was a failure of proof in that the Government failed to show that any question was ever put to petitioner orally or that he refused to answer orally	12
APPENDIX	13*

Table of Cases

	PAGE
Blatch v. Archer, Cowp. 66	8
Boyd v. United States, 116 U. S. 616, 635	5
District of Columbia v. Little, 178 F. 2d 13, 16-17	6
Federal Trade Commission v. American Tobacco, 264 U. S. 298	11
Grell v. United States, 112 F. 2d 861 (C. A. 8th)	7
Hale v. Henkel, 201 U. S. 43, 76	6
Jencks v. United States, 353 U. S. 657	9
Labor Board v. Virginia Electric Power Co., 314 U. S. 469	8
McMann v. Securities and Exchange Commission, 87 F. 2d 377, 379	6
Snowden v. Hughes, 321 U. S. 1	8
Thomas v. Collins, 323 U. S. 516, 537, 538	8
United States v. Manno, 118 F. Supp. 511 (N. D. Ill.)	7
United States v. Resnick, 299 U. S. 207, 209	11
United States v. Rumely, 345 U. S. 41	10
Watkins v. United States, 354 U. S. 178	11
Yick Wo v. Hopkins, 118 U. S. 356	8

Statutes

United States Code, Title 13:	
Section 221(a)	3, 10
United States Code, Title 18:	
Section 3231	2
United States Code, Title 28:	
Section 1254(1)	2
Act of August 28, 1957, 71 Stat. 485	3

Constitution

United States Constitution:	
Article 1, Section 2	3
First Amendment	2
Fourth Amendment	2

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WILLIAM RICKENBACKER,

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UNITED STATES OF AMERICA,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States.

Your petitioner, William Rickenbacker, prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above cause on October 29, 1962. That judgment affirmed a judgment of the United States District Court for the Southern District of New York convicting petitioner of a violation of 13 U. S. C. § 221(a), penalizing refusals to answer questions on a census schedule.

Opinions Below

The opinions of the United States District Court for the Southern District of New York (LEVET, *J.*), are set forth at pages 4a-6a (sustaining the indictment) and 73a-79a (on the merits) of the Appendix to petitioner's brief in the Court of Appeals. They are not reported.

The opinion of the Court of Appeals, not yet reported, is made a part of the appendix to this petition.

Jurisdiction

The jurisdiction of this Court is provided by § 1254(1) of Title 28 of the United States Code.

The jurisdiction of the District Court was provided by § 3231 of Title 18 of the United States Code.

Questions Presented

1. Did the use of coercion to require petitioner and 16,000,000 others to answer the intimate questions about their homes set forth in the Housing Questionnaire of 1960 violate the Fourth Amendment?

2. Did the singling out for prosecution of this petitioner from the perhaps hundreds of thousands who refused to answer this questionnaire, because he had written a critical magazine article, violate the First Amendment?

3. Does the statute, penalizing one who refuses to answer questions about "himself" and his "family," apply to this petitioner who refused to "fill out" a questionnaire asking questions about his house and the "extra persons" in the house?

4. Was there a failure of proof in that there was no showing that the census-taker at any time put to petitioner orally any question in the questionnaire?

Constitutional and Statutory Provisions

First Amendment:

> "Congress shall make no law * * * abridging the freedom of speech, or of the press; * * *"

Fourth Amendment:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated * * *"

13 USC § 221(a):

> "(a) Whoever, being over eighteen years of age, refuses or wilfully neglects, when requested by the Secretary or by any other authorized officer or employee of the Department of Commerce or bureau or agency thereof acting under the instructions of the Secretary or authorized officer, to answer, to the best of his knowledge, any of the questions on any schedule submitted to him in connection with any census or survey provided for by subchapters I, II, IV, and V of chapter 5 of this title, applying to himself or to the family to which he belongs or is related, or to the farm or farms of which he or his family is the occupant, shall be fined not more than $100 or imprisoned not more than sixty days, or both." (Act of August 28, 1957, 71 Stat. 485)

Statement of the Case

This prosecution arises out of the United States Census of 1960.

In 1960 the Bureau of the Census, in addition to the "enumeration" authorized by Article 1, Section 2 of the Constitution, submitted to "every fourth household * * * a sample household form" (8a).

This form is GX1 (50a). It asks numerous, detailed questions concerning the construction and equipment of the householder's dwelling. Among these questions are: "How many bedrooms are in your house or apartment?" "Do you have an electric or gas clothes dryer?" "How many bathrooms are in your house or apartment?" "Is this house connected to a public sewer?"

Also included in the housing questionnaire was a so-called "extra person questionnaire" (50a). This latter asked the householder many detailed intimate questions about all other people in his household, such as income (wages, tips, profits,

seven specified other sources), marital life (marriages, children), education (highest grade at school, college), service in Armed Forces, etc.

"Sometime in May, 1960" Mrs. Margaret Riolo, a Bureau employee, left this form at petitioner's home in Briarcliff Manor, New York (11a). This form is frequently referred to as the "blue form."

Later, in a telephone conversation, petitioner told Mrs. Riolo that he "hadn't [sent in the form], and he didn't intend to" (12a).

There was no evidence that Mrs. Riolo put any question to petitioner orally.

Petitioner had received the questionnaire. He felt it to be an unwarranted and unconstitutional invasion of the privacy of the citizen, a view which he expressed in an article entitled "The Fourth House", published in the May 21, 1960 issue of the magazine *National Review* (DXD, 64a-71a).

In this article petitioner characterized the "blue form" as "unconscionably long, uncivilly inquisitorial and absolutely unconstitutional" (64a). The reference was to the Fourth Amendment, quoted in full in the article (64a). Petitioner attacked the census as useless, meddlesome, bureaucratic and otherwise objectionable.

On December 19, 1960 petitioner was called before the Grand Jury. On that occasion, he assented to a statement put to him by the Assistant United States Attorney that "you and/or your wife notified the census enumerator that the form had not yet been completed and finally that it would not be completed" (GX2, 53a).

Thereupon the Assistant United States Attorney proceeded to ask petitioner most of the questions from the blue form questionnaire. Petitioner answered them responsively (DXA, 54a-61a).

This was the only time any Government officer or employee orally asked petitioner any of the questions on the questionnaire, as distinguished from asking him to "fill out" or "complete" the questionnaire.

At the trial petitioner introduced expert and other evidence that statistically valid data respecting the subject matter of the household questionnaire could have been obtained without questioning every fourth household, that is to say, some 16,000,000 people, and without the power of compulsion. This evidence is discussed *infra* pages 6-7.

The petitioner also introduced evidence that the motive for the prosecution against him was retaliation for his magazine article. This evidence is discussed *infra* page 9.

Reasons for the Writ

Essentially the reasons for granting the writ are that the first three questions involve decisions on federal questions in a way in conflict with applicable decisions of this Court; the fourth question involves sanctioning a departure from the accepted and usual course of judicial proceedings by a lower court. We take up these questions seriatim.

1. The use of coercion to require petitioner and 16,000,000 other people to answer the intimate questions about their home set forth in the Housing Questionnaire of 1960 violates the Fourth Amendment.

> "* * * [C]onstitutional provisions for the security of the person and property should be liberally construed. A close and literal construction deprives them of half their efficacy * * *" *Boyd* v. *United States*, 116 U. S. 616, 635.

A "too sweeping" order for the production of papers, *Hale* v. *Henkel*, 201 U. S. 43, 76, or a demand "out of proportion to the end sought," *McMann* v. *Securities and Exchange Commission*, 87 F. 2d 377, 379 (C. A. 2d), violate the Fourth Amendment.

> "The basic premise of the prohibition against searches was * * * the common law right of a man to privacy in his home, a right which is one of the indispensable ultimate essentials of our concept of civilization." *District of Columbia* v. *Little*, 178 F. 2d 13, 16-17 (C. A. D. C.).

We would be prepared to argue that to compel the production of a paper giving a detailed (1) inventory of the victim's house and (2) report of the intimate affairs of the people in the house *per se* violated the Fourth Amendment. However, in this case it is not necessary to go so far as it is abundantly clear that whatever information the Government sought could have been obtained without coercion and without questioning 16,000,000 householders; further, that the record affirmatively shows that there was no connection between the inquisition of this petitioner and the purpose of the housing census. The census was therefore "too sweeping" and "out of proportion to the end sought."

A highly qualified expert in the field of private surveys (15a-16a) testified that a statistically valid nationwide survey respecting household equipment and characteristics could be made by 500 to 5,000 interviews with an appropriately selected cross-section of the population (18a) and without coercion (22a).

The Bureau of the Census itself takes the unemployment survey—a survey of great importance which receives close attention from the highest Government officials, labor leaders and economists—by only 35,000 interviews (DXC1, 62a) and without coercion (63a).

The Bureau also takes its current population characteristics survey on 35,000 interviews (DXB).

No connection was shown between the questionnaire submitted to this petitioner and the stated purpose of the census. Thus Mr. Robert N. Burgess, Director of the Bureau of the Census at the time this census was taken, testified that its purpose was as follows (44a):

> "You see, the Housing Administration gives Government aid in certain cities for improving the housing conditions."

This petitioner lives at 507 Hardscrabble Road, Briarcliff Manor, New York.

The "connective reasoning"* between the questions addressed to him and this subject is by no means apparent and no effort was made to show it.

Thus, the record shows no necessity whatever for the search and invasion of petitioner's privacy.

2. The singling out of this petitioner for prosecution from the perhaps hundreds of thousands of people who refused to answer this questionnaire, because he had written a critical magazine article, violates the First Amendment.

The discussion of this question by the Court of Appeals wholly fails to mention the central fact relied on by petitioner, namely, that this prosecution punished petitioner for the publication by him of a magazine article severely criticizing the housing census (DXD, 64a-71a).

We readily concede the proposition that a defendant cannot escape punishment merely by showing that somebody else committed the same crime and was not prosecuted. This is all that is ruled by *Grell* v. *United States*, 112 F. 2d 861 (C.A. 8th) and *United States* v. *Manno*, 118 F. Supp. 511 (N.D. Ill.).

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* *Watkins* v. *United States*, 354 U. S. 178, 215.

On the other hand, a discrimination in law enforcement which is "purposeful" and results in an "unequal application (of the law) to those who are entitled to be treated alike" is invalid. *Snowden* v. *Hughes*, 321 U. S. 1.

The classic statement of the doctrine is in *Yick Wo* v. *Hopkins*, 118 U. S. 356. There it appeared that a statute was enforced against Chinese laundrymen but not against others. The Supreme Court granted a writ of habeas corpus to release a laundryman so convicted, saying at pages 373-374:

> "Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."

Yick Wo has been repeatedly cited to this day. This Court's most extensive review of the principle in recent years was in *Snowden* v. *Hughes*, mentioned above.

An otherwise valid statute can not be enforced so as to impair freedom of speech. *Labor Board* v. *Virginia Electric Power Co.*, 314 U. S. 469; cf. *Thomas* v. *Collins*, 323 U. S. 516, 537-538.

Obviously a prosecution intended to retaliate for an exercise of freedom of speech against one of thousands, perhaps hundreds of thousands, who had similarly violated the statute would fall within the condemnation of *Yick Wo*.

The evidence in this case establishes beyond doubt that such was the motivation of this prosecution, especially if recognition is given to the principle stated by Lord Mansfield that "all evidence is to be weighed according to the proof which it was in the power of one side to have produced and in the power of the other to have contradicted". (*Blatch* v. *Archer*, Cowp. 66.)

Preliminarily, it should be remarked that the Government with an unbefitting lack of candor inconsistent with the spirit of *Jencks* v. *United States*, 353 U. S. 657, has wholly failed to provide the exact facts. The case illustrates the handicap which the criminal defendant suffers by reason of the unavailability of discovery procedures comparable to those applicable to civil cases.

The evidence does establish that this is the only prosecution for refusal to answer the housing questionnaire known to Mr. Burgess, Director of the Census Bureau until March, 1961, long after the census was concluded (42a); that Mr. Burgess learned of petitioner's refusal from the magazine article (39a); that he passed on the reference to the General Counsel of the Department of Commerce of any request to initiate legal action (41a); that this case was brought to the attention of the United States Attorney for the Southern District of New York by a letter from the General Counsel of the Department of Commerce enclosing the magazine article and concluding: "I do not believe that Mr. Rickenbacker should be permitted to violate the law *in this manner*." (DXF, 71-72a.)

Mr. Burgess asserted that the number of refusals to answer the questionnaire was "*what we call small*" (36a), an expression he failed to elucidate. Although the census-taker (12a) and the local supervisor (9a) referred to reports of refusals contemporaneously made, the Bureau claimed in response to a subpoena duces tecum that there were no such reports (33a).

The private survey expert testified that in such surveys taken by him the number of refusals varied from five to ten per cent (22a), which would mean 800,000 to 1,600,000. The Census Bureau monthly unemployment survey states that the number of refusals is sufficiently substantial to require adjustment (DXC2, 63a).

Petitioner submits that it is relevant to refer to the following language from *United States* v. *Rumely*, 345 U. S. 41, 44:

> "• • • • Mr. Chief Justice Taft admonishes in a famous passage, Child Labor Tax Case, 259 U. S. 20, 37, that [the Court should not be so 'blind' as] not [to] see what '[a]ll others can see and understand.'"

3. 13 USC § 221(a), penalizing one who refuses to answer questions about "himself" and his "family" does not apply to this petitioner who refused to answer questions about his house and the "extra persons" in the house.

The crucial language is the statute limits the penal provisions to questions "applying to himself or to the family to which he belongs or is related, or to the farm or farms of which he or his family is the occupant."

A person's self simply is not his bedroom, his bathroom, his clothes dryer, his TV set or his house's connection with a public sewer.

If all questions about a man's possessions and relations apply to "himself," why specify those to which the criminal penalties relate? Surely questions about a man's family or the "farm of which he is the occupant" apply just as much to "himself" as those about the house in which he lives?

The Census Bureau in the very questionnaire at issue says (50a):

> "You will see questions *about your dwelling* are on the next page and that questions *concerning yourself and each other person in your household* are on the following pages."

Thus the Census Bureau itself, which presumably well knows the reaction of the ordinary citizen to questionnaires,

draws the same distinction between "dwelling" and "self" as does petitioner.

The Court of Appeals justified the application of the statute because some of the questions related to petitioner's "family."

But it is an "*extra person* questionnaire" (50a; lower right hand corner of sheet 3). Other people living in a house are not necessarily members of the family, nor do members of one's family necessarily live in this house.

Watkins v. *United States*, 354 U. S. 178, establishes that a question is entitled to know the subject with "undisputable clarity" (page 214) and that an overlap between the indicated subject and the true subject does not suffice. If the Government proposed to ask questions about petitioner's family it should have said so.

Although both the Court of Appeals and the questionnaire refer to questions about "self" they are not identified. Petitioner is unable to do so. Certainly there appear to be no such questions unless "self" be defined to include highly remote meanings.

Watkins by implication surely holds, further, that when a group of unauthorized questions are woven in with proper questions the proper questions cannot be isolated for purposes of a criminal conviction (page 215).

Moreover, criminal statutes will be strictly construed, *United States* v. *Resnick*, 299 U. S. 207, 209, and statutes involving searches of doubtful validity will be similarly construed. *Federal Trade Commission* v. *American Tobacco*, 264 U. S. 298.

4. There was a failure of proof in that the Government failed to show that any question was ever put to petitioner orally or that he refused to answer orally.

It seems obvious and was conceded in the Court of Appeals that §221(a) refers to oral questions and answers. Yet the Government failed to show that any question was ever put to petitioner orally by the census-taker or that he refused to answer orally when invited to do so. On the other hand, defendant showed that the only time questions were put to him orally he answered them (55a-61a).

What the Government did show was that petitioner had said "he wasn't going to fill out the form" (12a) and had failed to "fill out such a form" (29a) ("form" referring to the Household Questionnaire).

The opinion of the Court of Appeals, as petitioner reads it, puts upon a defendant the burden of showing that he did answer orally. Petitioner submits that such a ruling is a "departure from the accepted usual course of judicial proceedings." Surely the burden of proof in a criminal prosecution is on the Government.

Wherefore petitioner respectfully prays that a writ of certiorari issue under the seal of this Court to review the judgment herein of the United States Court of Appeals for the Second Circuit and to reverse said judgment.

November 28, 1962

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APPENDIX

Opinion of the Court of Appeals

UNITED STATE COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 105—October Term, 1962

(Argued October 17, 1962 Decided October 29, 1962)

Docket No. 27618

UNITED STATES OF AMERICA,

Appellee,

v.

WILLIAM F. RICKENBACKER,

Appellant.

Before:

WATERMAN, HAYS and MARSHALL, *Circuit Judges.*

Appeal from a judgment of conviction entered by the United States District Court for the Southern District of New York, Levet, *J.*, for refusing to answer a census schedule in violation of 13 U. S. C. A. § 221 (a). Affirmed.

SHELDON H. ELSEN, Asst. United States Attorney (Vincent L. Broderick, United States Attorney for the Southern District of New York, on the brief), (Arthur I. Rosett and Michael F. Armstrong, Asst. United State Attorneys, of counsel), *for Appellee.*

C. DICKERMAN WILLIAMS, New York, N. Y., *for Appellant.*

MARSHALL, *Circuit Judge*:

William F. Rickenbacker was convicted in the United States District Court for the Southern District of New York, after a one-day trial before Judge Levet sitting without a jury, for refusing to answer a schedule entitled "Household Questionnaire for the 1960 Census of Population and Housing," in violation of 13 U. S. C. A. § 221(a). Judge Levet imposed a suspended sentence of 60 days' imprisonment, fined the defendant $100, and placed him on probation for one day. Rickenbacker has appealed the conviction on several grounds. We find all of these grounds without merit and affirm.

Early in 1960, in connection with the administration of the decennial census, the Government sent a supplementary household questionnaire to every fourth household in the United States, including Rickenbacker's household in Briarcliff Manor, New York. Rickenbacker subsequently told a census enumerator that he did not intend to answer the questionnaire. He later told the Grand Jury that indicted him that he based his refusal to answer upon a belief that the questionnaire represented "an unnecessary invasion of my privacy" and upon a desire "to maintain liberties in this country as a constitutional philosophical question." He also stated that he did not rest his refusal upon any fear of self-incrimination. The indictment, trial, and conviction followed.

Appellant makes several arguments on appeal. He contends that the penal sanctions for refusal to answer census questions embodied in 13 U. S. C. A. § 221(a) may be applied only to a person who refuses to answer questions "applying to himself or to the family to which he belongs or is related," construed in a narrow, strict sense; and that Congress did not intend the statute to be applied to a person who refuses to answer questions relating to the contents, con-

struction, and conveniences of the house or household in which he lives. This question of statutory construction we do not reach, because it is clear that many of the questions on the household questionnaire which appellant refused to answer were immediately related to himself or to his family, even under the strict construction of the statute which he here advocates.

Appellant further argues that 13 U. S. C. A. § 221 "in its present form does not require written answers." However, during the time that the census was being taken appellant did not answer the questionnaire either orally or in writing. We also find no merit in appellant's claim that the household questionnaire violated his right under the Fourth Amendment to be free from illegal searches and seizures. The authority to gather reliable statistical data reasonably related to governmental purposes and functions is a necessity if modern government is to legislate intelligently and effectively. *United States* v. *Moriarity*, 106 Fed. 886, 891-92 (C. C. S. D. N. Y. 1901). Cf. *United States* v. *Sharrow*, — F. 2d — (2 Cir. 1962). The questions contained in the household questionnaire related to important federal concerns, such as housing, labor, and health, and were not unduly broad or sweeping in their scope. The fact that some public opinion research experts might regard the size of the household questionnaire "sample" as larger than necessary to obtain an accurate result does not support a conclusion that the census was arbitrary or in violation of the Fourth Amendment. See 13 U. S. C. § 195.

Finally, appellant contends that his conviction is invalid under the rule of *Yick Wo* v. *Hopkins*, 118 U. S. 356, because the motivation of the Government's decision to prosecute him was discriminatory. He bases this contention on the claim that although there is indication that other persons have also refused to fill out the household form, he is the only one against whom the Government has initiated

a criminal prosecution. This claim falls well short of proving the *Yick Wo* requirement that a statute has been "applied and administered by public authority with an evil eye and unequal hand." 118 U. S. at 373-74. "The fact that not all criminals are prosecuted is no valid defense to the one prosecuted." *United States* v. *Manno*, 118 F. Supp. 511, 515 (N. D. Ill. 1954); *Grell* v. *United States*, 112 F. 2d 861, 875 (8 Cir. 1940).

Appellant's other claims are without merit.

Affirmed.

Judgment of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-ninth day of October, one thousand nine hundred and sixty-two.

Present:

HON. STERRY R. WATERMAN,
HON. PAUL R. HAYS,
HON. THURGOOD MARSHALL,
Circuit Judges.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

WILLIAM RICKENBACKER,

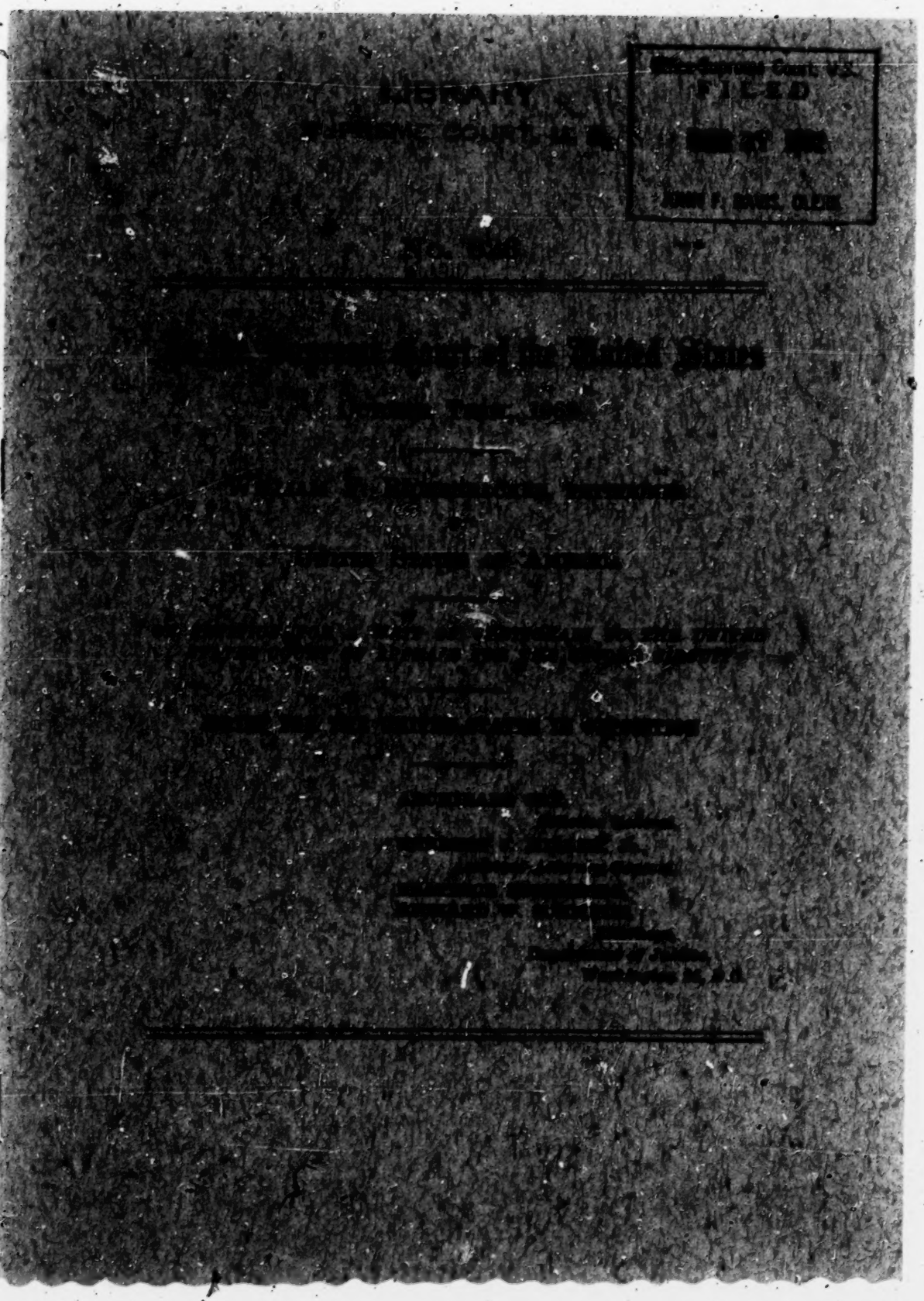
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO,
Clerk.



INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	1
Constitution and statutes involved	2
Statement	3
Argument	8
Conclusion	13

CITATIONS

Cases:	
Legal Tender Cases, 12 Wall. 457	10
Oklahoma Press Publishing Co. v. *Walling*, 327 U.S. 186	10
St. Regis Paper Co. v. *United States*, 368 U.S. 208	10
United States v. *Moriarity*, 106 Fed. 886	10
United States v. *Sharrow*, 309 F. 2d 77, pending on petition for certiorari, No. 755 Misc., this Term	10
Yick Wo v. *Hopkins*, 118 U.S. 356	12
Constitution, statutes, and rule:	
Constitution:	
Article I, Section 2, Paragraph 3	2, 10
Fourth Amendment	6, 10
National Housing Act of 1949, 63 Stat. 413	
13 U.S.C. 5	9
13 U.S.C. 141	2, 9
13 U.S.C. 195	2
13 U.S.C. 221 (68 Stat. 1023, Stat. 484)	3, 7, 8, 9
Rule 38(a)(4) F.R. Crim. P	4
Miscellaneous:	
S. Rep. No. 84, 81st Cong., 1st Sess.	11

670530—62——1

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 623

WILLIAM F. RICKENBACKER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (R. 81–83; Pet. App. 13–16) is not yet reported. The opinions of the district court (R. 4–6, 73–79) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on October 29, 1962 (R. 85; Pet. App. 17). The petition for a writ of certiorari was filed on November 28, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to support petitioner's conviction for willfully refusing to an-

swer a household questionnaire submitted to him by the Census Bureau as a part of the 1960 decennial census of population, housing and unemployment.

2. Whether the requirement that he answer the household questionnaire violated petitioner's Fourth Amendment rights.

3. Whether the government improperly discriminated against petitioner in prosecuting him.

CONSTITUTION AND STATUTES INVOLVED

Article I, Section 2, Paragraph 3 of the Constitution provides in pertinent part:

> Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers * * *. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. * * *

Section 141 of Title 13 U.S.C., 71 Stat. 483, provides in pertinent part:

> (a) The Secretary [of Commerce] shall, in the year 1960 and every ten years thereafter, take a census of population, unemployment, and housing (including utilities and equipment) as of the first day of April, which shall be known as the census date.
>
> * * * * *

Section 195 of Title 13 U.S.C., 71 Stat. 484, provides:

> Except for the determination of population for apportionment purposes, the Secretary may,

where he deems it appropriate, authorize the use of the statistical method known as "sampling" in carrying out the provisions of this title.

Section 221 of Title 13 U.S.C., 68 Stat. 1023, 71 Stat. 484, provides in pertinent part:

> (a) Whoever, being over eighteen years of age, refuses or willfully neglects, when requested by the Secretary * * * to answer, to the best of his knowledge, any of the questions on any schedule submitted to him in connection with any census or survey provided for by subchapters I, II, IV, and V of chapter 5 of this title, applying to himself or to the family to which he belongs or is related, or to the farm or farms of which he or his family is the occupant, shall be fined not more than $100 or imprisoned not more than sixty days, or both.

* * * * *

STATEMENT

Petitioner was charged by indictment returned in the United States District Court for the Southern District of New York with a violation of 13 U.S.C. 221(a), by willfully refusing in May 1960 to answer questions submitted to him on a household questionnaire for the 1960 census of population, unemployment and housing (R. 3). After a trial to the court in March 1962, a jury trial having been waived, petitioner was found guilty. He was sentenced to imprisonment for sixty days the execution of which was suspended, placed on probation for one day,

and fined $100 (R. 2, 79–80).[1] The court of appeals unanimously affirmed (R. 81–84, 85; Pet. App. 13–16, 17).

The pertinent facts may be summarized as follows:

1. In early 1960, the Bureau of the Census of the Department of Commerce distributed to households in the United States two types of forms in connection with the 1960 decennial census of population, unemployment and housing. One form—the "advance census report"—was mailed to every household in the nation, with instructions that it be filled out and turned over to a census enumerator who would call for it (R. 7–8). Petitioner received and completed this form as instructed (R. 29). The remaining form—the "household questionnaire"—was distributed to every fourth household in the nation, with instruction that it was to be completed and mailed to the Census Bureau (R. 8, 51). This questionnaire was distributed to approximately fifteen or sixteen million households, including petitioner's home in Briarcliff Manor, New York (R. 28, 29, 34, 45, 46). The cover page of the questionnaire noted in two places that federal law guaranteed that the information furnished would be kept confidential (R. 51a).

The household questionnaire consisted of two sections—a household section (questions H 17–H 46) and

[1] Petitioner was sentenced on May 17, 1962, and noted his appeal on the same day. Shortly thereafter, he paid the $100 fine, which left outstanding his sentence of one day's probation. Inasmuch as noting the appeal stayed the probation before it could possibly have been served (see Rule 38 (a) (4), F.R. Crim. P.), the case is not moot.

an "extra person" section (questions P 2–P 35), a total of 63 questions in all. The household section was prefaced with the notation that "Most of these questions refer to your own house or apartment *but note* that questions H 20, H 32, and H 33 are about the *whole building* in which you live," and posed questions relating to the household itself, *e.g.*, number of bedrooms and bathrooms, types of utilities, number and types of appliances, etc. (R. 51b–51c). The "extra person" section was prefaced with the notation that "After you finish the housing questions—Fill in the following pages for persons whose names have been written in by the Census taker," and posed questions relating to the "extra persons" in the household, *e.g.*, their names, birthplaces, occupations, employment, income, relationship to head of household, etc. (R. 51d–51e).

The Federal Housing Administration assisted the Census Bureau in framing the questions on the household questionnaire (R. 45, 47). Data from the questionnaires would, in normal course, be summarized and used by various governmental agencies and departments for guidance in such matters as aid to housing (R. 44, 45, 47–48).

2. In May 1960, Mrs. Margaret Riolo, an employee of the Census Bureau, left a household questionnaire at petitioner's home (R. 11). The form had not been completed when she subsequently returned for it, and she left a second household questionnaire. Mrs. Riolo subsequently telephoned petitioner's house "to see if the form had been completed and sent in" and was informed that petitioner was out of town (R. 11). A

short time later, Mrs. Riolo reached the petitioner by telephone at his home. Mrs. Riolo testified (R. 12):

> I asked him if he had sent in either of the forms that had been left with him. He said no, he hadn't and he didn't intend to. I told him I'd have to report this to my crew leader, and he said to go right ahead, that he wasn't going to fill out the form.

Petitioner wrote an article which appeared in the *National Review Magazine* of May 21, 1960, in which he challenged the propriety and legality of the household questionnaire and stated that he did not intend to answer the questionnaire, and that he had torn up the questionnaire which had been left with him (R. 64–71). Petitioner introduced the magazine article into evidence at the trial (R. 27–28, 64–71).

3. On December 19, 1960, petitioner appeared before a federal grand jury in New York. After being advised of his constitutional rights, he said that he told the census enumerator that he did not intend to fill out the household questionnaire (R. 52–53). The basis for this refusal was not possible self-incrimination or degradation; rather, he believed that the questionnaire violated his Fourth Amendment rights and his right to privacy. He said (R. 54–55):

> * * * I recognize that the Government has a need to collect statistics for legislative and regulatory purposes, but I recognize at the same time that many statistics are gathered by corporations and opinion polls, such as the Gallup Poll, without recourse to the coercive and compulsive force. They are volun-

> tary surveys and they serve their purpose. * * * I have no objection to the questions asked, per se. I have desired to maintain liberties in this country as a constitutional philosophical question.

Petitioner thereafter answered before the grand jury the questions contained in the household questionnaire (R. 30, 55–61). The grand jury testimony was introduced into evidence at the trial (R. 14–15, 52–61).

4. At the trial, petitioner testified that he did not fill out the household questionnaire; that he explained his action to the census enumerator; and that he was aware that his conduct conflicted with the statutes (R. 28–29, 30; see R. 53–54). He said that the magazine article which he wrote expressed his opinion as to the propriety of the questionnaire (R. 27).

In addition to testifying himself, petitioner called as witnesses Mr. Robert Burgess, the Director of the Census Bureau during the period in question, and Mr. Reuben Cohen, an expert in the field of private surveys. Mr. Burgess testified that although no information had been submitted to him while Bureau Director regarding the number or percentage of refusals to fill out census forms, the number of "complete refusals" was "very small" (R. 34–37). The Census Bureau had a policy of recommending prosecution in those cases involving individuals who "persisted in refusal" to answer census questions (R. 43).[2] Mr. Burgess first

[2] Mr. Burgess testified as a witness in *United States* v. *Sharrow*, 309 F. 2d 77 (C.A. 2), pending on petition for certiorari, No. 755 Misc., this Term, another prosecution under 13 U.S.C. 221 (R. 47).

learned of petitioner's refusal through his magazine article.

Mr. Cohen, the vice-president and chief statistician of the Opinion Research Corporation of Princeton, New Jersey, testified that in making nationwide surveys his company used sampling bases of from about 500 to 5,000 interviews (R. 17, 18, 25). He said that his company had no means of coercion or forcing the interviewees to answer questions, and that refusals to answer questions ranged from five to ten percent (R. 22). He and Mr. Burgess both testified that the Census Bureau, in conjunction with the Bureau of Labor Statistics of the Labor Department, conducted monthly surveys of population and employment based on about 35,000 interviews per survey without coercion (R. 24, 36–37, 62, 63).

ARGUMENT

1. (a) Petitioner contends (Pet. 12) that the evidence was insufficient to support the conviction because the government did not show that the census enumerator propounded any questions to him orally or that he refused "to answer orally when invited to do so." The short answer, however, is that 13 U.S.C. 221(a), *supra*, is not limited to refusals to answer appropriate questions which are in response to questions orally propounded. The statute makes it an offense for anyone over eighteen years of age to refuse or willfully neglect "to answer * * * *any* of the questions on *any schedule submitted to him* in connection with any census or survey * * * [concerning popula-

tion, housing, agriculture, drainage and unemployment], applying to himself or to the family to which he belongs or is related * * *" (emphasis added). The household questionnaire was a schedule authorized by and prepared under 13 U.S.C. 5, and was submitted to the petitioner for completion within the meaning of Section 221(a). The questionnaire did not provide or contemplate that any questions would be asked orally; it required the recipient to answer the questions in writing, and then to return the questionnaire to the Census Bureau.

(b) Petitioner's contention (Pet. 10–11) that Section 221(a) is inapplicable because the household questionnaire did not distinguish between "proper questions" relating to "self" and "family" and allegedly "unauthorized" questions relating to the household is frivolous. For the statute draws no such distinction; Section 141 specifically authorizes questions relating to "housing (including utilities and equipment)." In any event, as shown in the Statement, *supra*, the questions pertaining to household were adequately differentiated from those relating to the persons within that household. The household questions were numbered beginning with the letter "H" and were prefaced by a statement that the questions following it related to the household. The questions relating to the persons within the household were numbered beginning with the letter "P" and were prefaced by a similar statement. And, as the court of appeals pointed out in rejecting another contention, not here made, based on the distinction between questions relating to family and to household, "many of the questions on the house-

hold questionnaire which appellant refused to answer were immediately related to himself or to his family * * *" (Pet. App. 15).

2. There is no substance to petitioner's claim (Pet. 5–6) that the household questionnaire violated his rights under the Fourth Amendment. There was no unauthorized intrusion into petitioner's house; no search of the petitioner or of his premises; no seizure of the petitioner or of any of his private papers and effects. The demand that petitioner answer a limited number of questions based on his own personal knowledge of his household in order to provide statistical data which would be held confidential cannot be equated to a "dragnet" subpoena for the production of books and records over a long period of time to be used in uncovering violations of law.

While Article I, Section 2, Paragraph 3 of the Constitution, *supra*, merely imposes upon Congress the duty of taking an enumeration of the population every ten years "in such Manner as they shall by Law direct," there is no question but that Congress, in addition to taking a physical census of the population, may provide at the same time for the collection of information and statistical data reasonably related to governmental functions and purposes. See *Legal Tender Cases*, 12 Wall. 457, 536; *United States* v. *Moriarity*, 106 Fed. 886, 891–892 (S.D.N.Y.). Cf. *United States* v. *Sharrow*, 309 F. 2d 77 (C.A. 2), pending on petition for certiorari, No. 755 Misc., this Term. Cf. *St. Regis Paper Co.* v. *United States*, 368 U.S. 208, 215–220; *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186.

As to the housing census, the Senate Report on the National Housing Act of 1949, 63 Stat. 413 (S. Rep. No. 84, 81st Cong., 1st Sess., p. 27) clearly explained the need for such information.

> In its study of the housing situation your committee has been deeply impressed by the urgent need for a comprehensive picture of the size and quality of the Nation's housing inventory. Time and again in the course of the testimony on this bill the importance of knowing in detail the facts about the housing supply which provides shelter for some 40,000,000 American families became apparent. While the sample census taken in April 1947 has shed considerable light on the over-all magnitude of our present problem and has emphasized the deficiency in our housing inventory in terms of its adequacy for meeting the needs of a substantial segment of our population, there are many gaps in our knowledge which can only be filled by a complete census of housing which will provide an accurate measure of the changes in the size, characteristics, and quality of the housing supply, community by community, and furnish a basis for a careful reappraisal of the problem in the light of conditions then prevailing.

Petitioner also complains that the information sought by the government on the household questionnaire could have been obtained without coercion and without a sampling of 16,000,000 householders (Pet. 6–7). He relies upon the testimony of an expert in the field of private surveys and the testimony of Mr. Burgess and exhibits showing that the government makes certain monthly surveys without coercion and

upon a sampling base of 35,000 interviews. However, petitioner's own expert testified that, generally speaking, a larger sampling base would yield more accurate results (R. 26). The government had the right to make its data as exact as it deemed appropriate. Mr. Burgess testified (R. 46):

> The difficulty is there that we were going through the census purposely. We were going to go into enough details, so if I remember, Professor Millstein of Princeton was very reluctant to endorse our going ahead with the one and four sampling for those particular things, for our purposes. *They needed to be able to differentiate within a city, down to blocks, enumeration of districts* [emphasis added].

In any event, as the district court said (R. 78):

> The fact, even if true, that 5,000 interviews or questionnaires would suffice does not excuse defendant. In no event would he be entitled to the special privilege of elimination. He is in no position, on the other hand, to complain upon behalf of the 15,000,000.

3. Finally, petitioner contends (Pet. 7–10) that his prosecution was initiated in retaliation for his writing of the magazine article and that his conviction therefore resulted from discriminatory enforcement of the statute and is invalid under *Yick Wo* v. *Hopkins*, 118 U.S. 356. He emphasizes that his refusal to answer the questions was first brought to Mr. Burgess' attention through the magazine article, and that a letter from the Department of Commerce to the United States Attorney referring the

matter for "further proceedings" enclosed a copy of the magazine article and closed by stating that petitioner should "not * * * be permitted to disregard the law in this manner" (R. 71–72). The short answer, however, is that the petitioner was prosecuted for his adamant and willful refusal to answer the questionnaire, not for his writing the magazine article. The magazine article, to be sure, confirmed that petitioner's refusal was willful. Indeed, petitioner testified at the trial that the magazine article expressed his opinion of the household questionnaire, and he introduced the magazine article into evidence as a defense exhibit (R. 27–28, 64–71). There is nothing in the record to indicate that petitioner's prosecution was discriminatory. He was indicted by an unbiased grand jury which heard petitioner admit before it that he had told the census enumerator that he did not intend to fill out the questionnaire. In such circumstances, the grand jury had little choice but to return an indictment.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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Supreme Court of the United States

No. 623

WILLIAM RICKENBACKER,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITIONER'S REPLY BRIEF

Petitioner will comment briefly on the arguments advanced in the Government's Brief.

1. Petitioner's Reason No. 1; Government's "2." The constitutional validity of Government action must be shown by evidence. *Bibb* v. *Navajo Freight Lines*, 359 U. S. 520; *Borden's Farm Products* v. *Baldwin*; 293 U. S. 194, 209; *Chastleton Corp.* v. *Sinclair*, 264 U. S. 543, 548-549. There was no evidence showing the "connective reasoning," *Watkins* v. *United States*, 354 U. S. 178, 215, between whatever necessity existed and the inquiries directed at petitioner.

2. Petitioner's Reason No. 2; Government's "3." The Government's Brief impliedly concedes that petitioner was the only person prosecuted for refusing to answer the housing questionnaire; the Brief claims that the number of other persons so refusing was "small" (Director Burgess said "what we call small", 36a, out of 16,000,000 people) and once more fails to give any approximation of the number of those who, like petitioner, were "adamant." Moreover, it is unrealistic under the circumstances to say that petitioner was singled out because he was adamant; he was singled out because he forcefully expressed the reasons why he was adamant.

3. Petitioner's Reason No. 3; Government's "1(a)." The Government says 13 USC § 141 authorized this census. True, but the question is, did § 221(a) authorize this prosecution? Petitioner contends that this census is like a number of censuses and surveys authorized by Title 13, respecting which there are no criminal penalties, e.g., the unemployment census (63a), and the group of censuses provided by schedule III of chapter 5 of Title 13. (Actually 13 USC § 222 provides the criminal penalties applicable to the housing census; it has never been suggested that petitioner violated that section.)

4. Petitioner's Reason No. 4; Government's "1." The Government now says § 221(a) requires answers in writing, apparently recognizing that only on this construction is there evidence to sustain the present conviction. In the Court of Appeals the Government acquiesced in petitioner's argument that the statute only required oral answers, reasoning that (a) statutes requiring written answers expressly say so, e.g., Rule 33; and (b) there are and have been during the currency of the statute (since the census of 1870) many illiterate and non-English speaking residents of the United States.

CONCLUSION

The writ of certiorari should be granted.

Respectfully submitted,

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